

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION****(Supplemental)****David L. Kabaker, Referee**

PARTIES TO DISPUTE:**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES****BOSTON AND MAINE RAILROAD**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it arbitrarily abolished the positions of Crossing Tender at Elm Street in Waltham, Massachusetts, effective as of September 9, 1959, and thereafter assigned the work comprehended in said positions to employees who hold no seniority rights under the provisions of this Agreement.

(2) Each Crossing Tender affected by the violation referred to in Part (1) of this claim, be allowed pay for all time lost because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The highway crossing at Elm Street in Waltham, Massachusetts is on the Carrier's main line west to Mechanicville, New York, which connects with other Carrier lines exchanging freight between Boston and the west. Besides the switching work and other rail traffic such as work trains, extra trains, motor cars and etc., there are a total of twenty-four (24) passenger trains and ten (10) scheduled freight trains which pass over the aforementioned crossing daily.

For many, many years the operation of the crossing gates from a tower at the subject location has been exclusively assigned to and performed by Crossing Tenders within the scope of the Agreement between this Carrier and this Brotherhood.

Although the rail and highway traffic over this crossing has not diminished, the Carrier arbitrarily abolished the three regular and two relief positions of Crossing Tender effective as of September 9, 1959 and thereafter assigned the work comprehended in said positions to employees (Train Directors) coming within the scope of the Carrier's Agreement with The Order of Railroad Telegraphers.

Subsequently, when the gates at the subject crossing become inoperative because of weather conditions, the Carrier called and used Crossing Tenders to perform the crossing protection work until the gates were repaired and placed in operation.

The Agreement violation was protested and instant claim was presented and progressed in the usual and customary manner on the property and was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated November 29, 1943, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Elm Street Tower, Waltham, Massachusetts, houses the pneumatic gate controls for the protection of Elm Street and River Street Crossings.

For some time prior to September 9, 1959, the Respondent employed two classes of employes in the tower around the clock namely train directors (ORT) and crossingtenders (M of W). Traffic on this line of railroad had declined to such an extent that much less than eight man-hours per trick existed between both classes. This resulted from dieselization of freight service and discontinuance of much passenger service.

Because awards of your Board have specified that crossingtender work is not the exclusive right of any class of employe (two of such awards involving the instant parties), and because a letter of agreement was signed with the Order of Railroad Telegraphers (see Respondent's Exhibit "A"), the Respondent abolished the crossingtender positions and assigned the remaining work to the surviving ORT employe in the tower.

Petitioner made claim that Respondent's action was in violation of the Agreement. Claim was declined.

(Exhibits not reproduced.)

OPINION OF BOARD: The basic facts are not in dispute. The issue before the Board is whether the Carrier violated the Agreement when it abolished the positions of Crossing Tender at Elm Street, Waltham, Massachusetts and assigned the work in said positions to employes coming within the scope of Carrier's Agreement with the Order of Railroad Telegraphers.

The Organization claims payment for monetary loss sustained by each Crossing Tender affected by the Carrier's action of abolition of their jobs. The Carrier denied the claim on the ground that the Agreement was not violated.

The Organization contends that the traffic conditions at the crossing had remained relatively unchanged and that highway and pedestrian traffic had increased over the years.

It further maintains that the work of Crossing Tenders is recognized as work falling within the Maintenance of Way Agreement. It asserts that positions and the work here involved have been established through custom and practice as part of the Agreement. It concludes therefore that the

removal of such work from employees covered by the Agreement constitutes a violation thereof.

The Carrier's position is that the Scope Rule of the Agreement between the Parties does not provide for the exclusive use of employees coming under the Maintenance of Way Agreement to operate crossing gates.

It submits that inasmuch as the work involved is not the exclusive work of employees covered by the Agreement with the Organization the claim must be denied.

The Board is of the opinion that the evidence supports the Carriers position. The proof fails to show that the work involved was the exclusive work of employees covered by the Maintenance of Way Agreement nor does the Agreement contain any provision that affirms that all such work belongs exclusively to employees covered by Carrier's Agreement with the Organization.

This Board has, on two occasions, been presented with the identical issue between the same Parties.

In Award 5575 (Referee Whiting), between the instant Parties, the Board stated:

"The Scope Rule of the Agreement provides that 'the rules of this agreement apply to the following employees on payrolls of the Operating Department: Crossing Tenders.' Nowhere in the agreement is there any provision requiring any specific crossings to be protected by a crossing tender nor establishing any criteria for determining which crossing should be so protected . . . we think the Scope Rule, as it states, covers employees in the classification of crossing tender but does not require their employment at any specific crossing."

In Award 7809 (Referee Larkin) the Board in passing on another similar matter between the same Parties referred to its prior Award 5575 and stated the following in the Opinion:

"The Scope Rule of the Maintenance of Way Agreement, as it stands, has not been violated in this instance, since it does not provide for the exclusion of others in the performance of the service in question. Nor do we find any other provision of the parties' Agreement which has been contravened."

We find, in the instant matter, that the Agreement does not reserve to Crossing Tenders the exclusive right to perform such work as here involved.

As a consequence of such finding, it must be the conclusion that the Carrier did not violate any provision of the Agreement when it abolished the positions at Elm Street in Waltham, Massachusetts on September 9, 1959 and assigned the work to employees not covered by this Agreement. Support for this conclusion is found in Award 5575, 7809 and 9605.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 2nd day of August 1966.